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IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TROY DUANE HERRING,

Defendant.

Case No.: 15CR0263-AA

DEFENDANT'S SENTENCING
 MEMORANDUM

Sentencing Hearing July 21, 2016
 Judge Anne Aiken

Comes now Defendant, Troy Duane Herring, by and through his attorney
 Marc P. Friedman, and respectfully submits the following information and requests
 the court consider the factors set forth below, and the materials submitted as
 attachments hereto.

Introduction

Mr. Herring is 49 years old.

The pendency of this case has taken toll upon his health. He struggles
 with mental health and drug and alcohol issues. He carries a dual diagnosis for

depression and drug use. A copy of Mr. Herring's jail medical records for his current incarceration in the Lane County jail was provided to Parole and Probation and is attached to the PSR.

Mr. Herring has never received any specific or long term treatment for these conditions. However, most urgently Mr. Herring needs to receive proper care and treatment for his prosthetic leg.

ADDITIONAL RELEVANT FACTS

Criminal Charge

Mr. Herring acknowledges his role in the crime charged and to which he pled, as well as other uncharged conduct. He continues to struggle with leaving the associations and life which has drawn him into criminal conduct. He deeply regrets his conduct and hope to take steps to once and for all get set on the right path.

SENTENCING CONSIDERATIONS

Criminal History

The PSR calculation is accurate.

Offense Level Computation

Base Level - U.S.S.G §2K2.1	24
Obstruction of Justice - U.S.S.G §3C1.1	2
Acceptance of Responsibility (U.S.S.G §3E1.1)	-3
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Other Adjustments:

Substantial assistance for cooperation

-3

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(70 - 87 months)

Additional adjustments under 18 UCS §3553(a):

Government joins in the recommendation of a downward departure to 60 months.

Adjustments under 18 UCS §3553(a)

18 U.S.C. § 3553(a) POST-BOOKER

Pursuant to *United States v. Booker*, 125 S.Ct. 738 (2005), the Sentencing Guidelines are advisory. Sentencing post-Booker has been in some flux. See, *Gall v. United States*, 128 S.Ct. 586, 591 (2007). The United States Supreme Court, however, has finally put to rest the issue of how much discretion the District Court has when imposing a sentence. See *id.* at 600.

Sentencing Post-Gall

The United States Supreme Court in *Gall* laid out the procedure to be undertaken by the District Court during sentencing:

First, "a district court should begin all sentencing proceedings by correctly calculating the applicable guidelines range. As a matter of administration and to secure nationwide consistency, the guidelines should be the starting point and the initial benchmark. The guidelines are not the only consideration, however." *Id.* at 596.

1 Second, "after giving both parties an opportunity to argue for whatever
2 sentence they deem appropriate, the district judge should then consider all of the
3 § 3553(a) factors to determine whether they support the sentence requested by a
4 party. In so doing, he may not presume that the guidelines range is reasonable . . .
5 He must make an individualized assessment based on the facts presented." Id. at
6 596-97.
7

8 Third, "if [the District Court] decides that an outside-guidelines sentence is
9 warranted, he must consider the extent of the deviation and ensure that the
10 justification is sufficiently compelling to support the degree of the variance. We
11 find it uncontroversial that a major departure should be supported by a more
12 significant justification than a minor one." Id. at 597.
13

14 Fourth, "[a]fter settling on the appropriate sentence, [the District Court] must
15 adequately explain the chosen sentence to allow for meaningful appellate review
16 and to promote the perception of fair sentencing." Id.
17

18 Appellate Review post-Gall 19

20 The Court in Gall then set out the standards for review of a District Court's
21 sentence as:

22 First, "[r]egardless of whether the sentence imposed is inside or outside the
23 guidelines range, the appellate court must review the sentence under an abuse of
24 discretion standard." Id.
25

1 Second, in so doing, "[the Appellate Court] must first ensure that the district
2 court committed no significant procedural error, such as failing to calculate (or
3 improperly calculating) the guidelines range, treating the guidelines as mandatory,
4 failing to consider the § 3553(a) factors, selecting a sentence based on clearly
5 erroneous facts, or failing to adequately explain the chosen sentence." Id.
6

7 Third, "[a]ssuming that the district court's sentencing decision is
8 procedurally sound, the appellate court should then consider the substantive
9 reasonableness of the sentence imposed under an abuse of discretion standard.
10 When conducting this review, the court will, of course, take into account the
11 totality of the circumstances, including the extent of any variance from the
12 guidelines range." Id.
13

14 Fourth, a sentence, however, "[I]f the sentence is outside the guidelines
15 range, the [appellate] court may not apply a presumption of unreasonableness. side
16 the guidelines range is not be presumed unreasonable. It may consider the extent of
17 the variation, but must give due deference to the district court's decision that the §
18 3553(a) factors, on a whole, justify the extent of the variance." Id.
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21 Fifth, appellate courts cannot substitute their judgment for the sentencing
22 judge. "The fact that the appellate court might reasonably have concluded that a
23 different sentence was appropriate is insufficient to justify reversal of the district
24 court." Id.
25

18 U.S.C. § 3553(a) -- Factors to be considered in imposing a sentence. The Court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The Court, in determining the particular sentence to be imposed, shall consider:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed -
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

Because of the Booker and Gall decisions, the Sentencing Guidelines' limitations on factors a court may consider in sentencing-e.g., the impermissible grounds for departure set forth in U.S.S.G. § 5K2.0(d), no longer restrict the court's discretion. See *United States v. Zavala*, 443 F.3d 1165, 1171 (9th Cir. 2006). Judges must consider the goals and purposes of 18 U.S.C. §3553(a) and impose a sentence that furthers those objectives. *Id.*

APPLICABLE MITIGATING SENTENCING FACTORS

We ask the court to consider Mr. Herring's role in these circumstances, his medical condition and as well as other appropriate factors.

SENTENCING RECOMMENDATION

When the 18 U.S.C. § 3553(a) factors are considered the court must find that the nature and circumstances of the offense and Mr. Herring's history and characteristics; the seriousness of the offense in light of the need to promote

1 respect for the law and to provide just punishment for the offense; the desire to
2 afford adequate deterrence to criminal conduct; to protect the public from further
3 crimes of the defendant; and to provide the defendant with medical care all suggest
4 a sentence well below the guidelines.

5
6 Mr. Herring acknowledges the negotiations in his case and accepts the fact
7 that a sentence of 60 months will be imposed. He understands that he will serve a
8 60 month sentence less credit for time served (approximately 12 months) and good
9 time (approximately 9 months).

10
11 He asks the court to follow the recommendations of the parties and impose a
12 sentence of 60 months. He further requests that the court make the
13 recommendations for placement contained in the PSR – Danbury FCI for the
14 Resolve Program for Men. If Mr. Herring is not placed in the treatment program
15 in Danbury FCI, we request that he be sent to a camp facility other than Sheridan.
16 Mr. Herring would further welcome the opportunity to enter an RDAP program.
17 Upon release and while on post-prison supervision he would like to participate in
18 the court's Reentry Program.
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21 Additional Request

22 Mr. Herring has an additional request. We are hopeful that Mr. Herring may
23 be permitted a period of pretrial release to deal with the fitting of his prosthetic leg.
24 However, if he is unable to receive required treatment for his prosthetic leg during
25

1 a period of pretrial release, we request that the court permit Mr. Herring to self-
2 report. Specifically, Mr. Herring must have his prosthetic leg adjusted before he
3 goes into BOP custody. This will require multiple trips to the prostheses provider.

4 A letter from Hanger Clinic is attached:

5
6 Hanger Clinic: Prosthetics & Orthotics
7 445 Harlow Road
8 Springfield, OR 97477

9 We request the court release Mr. Herring following sentencing and direct
10 that he turn himself in within 3-4 weeks.

11 It is best that Mr. Herring improve his health and become a valuable and
12 productive individual. It will serve the community, the injured party and the court
13 well if he is permitted to his as a productive community member.

14 Dated this 18th day of July, 2016.

15
16 Respectfully Submitted,

17 /s/ Marc Friedman
18 Marc P. Friedman, OSB #89244
19 Attorney for Troy Duane Herring
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